

Mediating Family Disputes in a World with Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program*

RENÉ L. RIMELSPACH**

I. INTRODUCTION

As of the mid-1990s, "[t]he National Center for State Courts estimate[d] that more than 200 court-connected mediation programs exist[ed] nationwide."¹ The growth and popularity of mediation has been expanding in all areas of the law, and it does not appear that the trend will reverse itself any time in the near future. Courts have been implementing mediation programs in an effort to cut costs, increase efficiency, and better respond to the public's increasing demands on the traditional court system.

In light of these goals, mediation has been especially popular in the area of family law. Many feel that the mediation approach of collaborative decision making is a particularly appropriate tool in the midst of interfamilial disputes.² However, the appropriateness of family mediation in cases involving domestic violence³ has been a point of contention between those

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** B.A., 1998, University of Notre Dame; J.D., 2001, The Ohio State University Moritz College of Law. I wish to thank my family for making my education and career possible.

¹ Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, FAM. ADVOC., Winter 1995, at 34. Court-based mediation of family disputes has spread to jurisdictions in at least thirty-eight states and the District of Columbia. *Id.* Further, at least thirty-three states have statutes or court rules that mandate mediation in contested custody and visitation cases. *Id.*

² *Id.* at 34-35. Proponents of mediation argue that enabling separating parties to "participate directly in divorce related decision-making is preferable to the typically divisive nature of the adversarial legal proceedings." *Id.*

³ See Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 335 (1999) ("Of all marriages referred to court-based divorce and custody/visitation mediation programs, 50% to 80% involve domestic violence."). See also Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6, 7 (1995) ("Indeed, there is compelling evidence that spousal abuse is present in at least half of custody and visitation disputes referred to family court mediation programs."). But see David B. Chandler, *Violence, Fear, and*

who favor the use of mediation in the family arena and those who contend that mediation can be both unfair and potentially dangerous. It is important to carefully consider both sides of this division, and recognize that persuasive arguments emanate from each side in this dispute.

However, the fact remains that many domestic relations court-connected mediation programs do exist, and the use of these types of programs will most likely continue to be expanded. In light of this fact, the ultimate goal of this Article is to make suggestions in order to maximize the safety and effectiveness of court-connected programs. Part II of this Article will examine some of the arguments against utilizing mediation in the domestic relations area. Part III will highlight some of the arguments in favor of utilizing court-connected mediation programs in the area of family law, as well as rebut the concerns discussed in Part II. Finally, Part IV will explore some of the options available to courts in setting up a safe and effective court-connected domestic relations mediation program.

Ultimately, it is the contention of this Article that the court system has a duty to offer a full range of dispute resolution processes, including mediation, especially in the family court arena. Additionally, courts must assure the public that their programs are as safe and effective as possible, in order to ensure the continuing legitimacy of the programs and the court system. By critically examining and ultimately implementing the wide variety of options available to address domestic violence, court-connected mediation programs can ensure their own success. This will best serve the court system and the public as a whole.

II. THE ARGUMENTS WEIGHING AGAINST COURT-CONNECTED MEDIATION PROGRAMS IN LIGHT OF THE PREVALENCE OF DOMESTIC VIOLENCE

The arguments against utilizing mediation where there is evidence of domestic violence raise significant public policy concerns. Power issues are of a major concern to those who disfavor mediation in situations where there is evidence of domestic violence. To begin, many argue that women's lack of power relative to men in our society generally makes mediation a poor

Communication: The Variable Impact of Domestic Violence on Mediation, 7 *MEDIATION Q.* 331, 331 (1990) (finding that in a study of divorcing couples, only twenty-three percent had a history of violence). Even in light of more conservative estimates of the prevalence of family violence, it is still difficult to escape the fact that many divorcing couples experience some sort of spousal violence during their marriage.

option.⁴ Critics of mediation argue that effective mediation is premised on a relatively equal balance of power,⁵ and that where domestic violence is present, even the most skilled mediator will likely not be able to compensate for the disparity of power.⁶

Those not in favor of mediating where there has been domestic violence also argue that the methodology and ideology of mediation make it ill-equipped to deal with domestic violence. Mediation requires that parties engage in joint decision making that is premised on honesty, that they have a desire to settle the dispute, and that they have the capacity to compromise; all characteristics that may be lacking in a relationship plagued with domestic violence.⁷ As one commentator stated, "It is difficult to imagine a batterer coming to a mutually agreeable outcome with his partner in mediation; it is equally difficult to imagine that he will comply with an agreement he believes is unfair to him."⁸

⁴ See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (arguing that rather than being a feminist alternative to the traditional litigation process, mediation can instead be destructive to women). But see Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 227-29 (1992) (arguing that even taking into consideration gender-based power imbalances, mediation can be an effective process for women).

⁵ See Maxwell, *supra* note 3, at 337 ("Mediation . . . is predicated on the assumption that the parties have a relatively similar degree of decision-making power in the situation."). See also Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?* 14 OHIO ST. J. ON DISP. RESOL. 855, 860 (1999) (citing WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 25 (1988) ("In order for mediation to be effective, there must be a roughly equal distribution of power between the parties.")).

⁶ Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?* 70 N.D. L. REV. 255, 267 (1994) ("Once violence occurs in a relationship, the equation of intimacy is changed forever. Prior to the violent event, the parties may have been able to approach the mediation table on 'equal ground' . . . After the violent event, the intimacy of the relationship will never again hold such equality."). See also Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 320 (1990) ("The most skilled mediator cannot offset sharp disparities of power between batterers and battered women.").

⁷ See Imbrogno, *supra* note 5, at 863-64. See also Hart, *supra* note 6, at 320 ("Cooperation by a batterer with his wife/partner is an oxymoron. Cooperation, in common practice, means to act or work together for mutual benefit. A batterer is not someone who can cooperate. He understands mutual benefit as synonymous with his exclusive self-interest.").

⁸ Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 275 (1992).

Another range of arguments against using mediation in situations of domestic violence challenges the presumption that women who have been victims are able to articulate and/or discern their own interests and needs.⁹ Advocates note that women who have been conditioned to always consider their spouse's needs ahead of their own will be unable to break out of this habit in a mediation setting. As one outspoken mediation critic has stated,

The reality is that the battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, not free to identify and advocate for components essential for her autonomy and safety and that of her children, not free to terminate mediation when she concludes it is not working. She is ultimately not free to agree or disagree with the language of the agreement. Her apparent consent is under duress.¹⁰

The concern of those who are critical of mediation in cases of domestic violence is that the psychological damage has rendered the battered woman unable to be an advocate for her own needs and desires. They believe that domestic abuse creates an atmosphere in which the victim is likely to be extremely fearful, intimidated, and unable to challenge the authority asserted by the abusive spouse.

Another reason marshaled against using mediation where there has been domestic violence is the belief that mediation places victims at increased risk for continuing and future violence. As most commentators will agree, "the most dangerous time for a battered woman is when she separates from her partner."¹¹ But if mediation is used, even mandated, then the mediation conference may allow a batterer access to a spouse who has successfully evaded contact since the separation.¹² As a result of those mediated conversations, the batterer may have the opportunity to discover his spouse's location, or even harass her at the mediation.¹³ Of even more concern than

⁹ See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2169 (1993) ("[B]attered women have been socialized over the course of their abusive relationship to pay attention to the abuser's [sic] needs and to denigrate her [sic] own . . . [T]he oppression a battered woman experiences during the abusive relationship may impede . . . her ability to even know what her needs are . . .").

¹⁰ Hart, *supra* note 6, at 321.

¹¹ See Fischer et al., *supra* note 9, at 2138-39.

¹² See Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL LAW. 447, 452-53 (1997) ("For example, in states where mandatory mediation is the practice, a woman who has been evading her batterer might be forced by court order to come out of hiding, giving her batterer an opportunity to discover her location and harass or attack her.").

¹³ *Id.* at 453.

the potential danger from face-to-face contact is the possibility that mediated agreements will give the batterer more access to the victim overall, because of the alleged pressure in mediation to agree to generous visitation provisions.¹⁴

Critics have also argued that court-connected mediation of cases presenting allegations of domestic abuse is just another example of the court failing to treat domestic violence as a crime.¹⁵ The mere fact that the court allows mediation of cases where family violence is present sends a message to both the abuser and the victim that "violence is not so serious as to compromise the parties' ability to negotiate as relative equals;" additionally, "the message of offender accountability for his use of violence becomes blurred."¹⁶ Others claim that "merely allowing batterers to negotiate with their victims undermines the criminal justice system's message to batterers that their conduct is illegal and wrong."¹⁷ Critics fear that relegating cases of domestic violence to mediation programs rather than criminal prosecution or public civil divorce trials will take violence out of the public eye, and reinforce the old adage that domestic violence is a "family problem."

These are only some of the criticisms that have been leveled against mediation in the context of domestic violence; while they may represent some of the most persuasive arguments, this is far from an exhaustive list. Other fears include the following: that mediators will not be aware of violence because it is typically well-hidden; that mediation agreements have few enforceability mechanisms, and therefore fewer noncompliance consequences; that without discovery powers, mediation cannot ensure full disclosure; that mediators utilize coercive tactics to force agreements; that the future-oriented nature of the process ignores the reality of the past abuse and many others.¹⁸ It is undeniable that critics of mediating when domestic violence is present have relevant, forceful arguments, not easily discounted.

¹⁴ *Id.*

¹⁵ *Id.* ("Mandatory mediation dilutes the message that violence in any context is unacceptable.").

¹⁶ Anne E. Menard & Anthony J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 *MEDIATION Q.* 293, 299 (1990).

¹⁷ See Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 *WILLAMETTE L. REV.* 905, 911 (1997).

¹⁸ See Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303, 311-12 (1990) (listing the variety of criticisms leveled at mediation which are not discussed fully here).

III. THE ARGUMENTS SUPPORTING COURT-CONNECTED MEDIATION PROGRAMS DESPITE THE PREVALENCE OF DOMESTIC VIOLENCE

It has been argued that the question of whether or not to mediate in light of domestic violence should be evaluated based upon a utilitarian analysis: does mediation provide more benefits than harms?¹⁹ As one commentator further explained, "Only if mediation or any of these processes is found to contribute more to violence than to societal benefit is there a clear case to reject such a process."²⁰ Despite the opposition to mediation when domestic violence is present, there are many persuasive arguments emphasizing that not only is there not a clear case for rejecting mediation, but also on the whole its use is more beneficial than harmful to society in general and to women specifically.

To evaluate the potential benefits versus the harms of mediation, we must first clarify our understanding of "domestic violence" and "battered women." Most mediation proponents agree that there are some cases where mediation is simply inappropriate, a fact that many opponents of mediation seem oftentimes to ignore.²¹ Those who argue emphatically against mediation tend to assume that the couple is involved in a pervasive "culture of battering,"²² whereby the woman has been so brutalized and demoralized by her abusive partner that she is rendered a passive shadow of her former self, unable to bargain in any meaningful way.²³ However, this ignores the reality of a "continuum" of family violence, ranging from pervasive abuse to occasional violence.²⁴ It is the contention of many that "[m]ediation can be

¹⁹ See Allan Edward Barsky, *Issues in the Termination of Mediation Due to Abuse*, 13 MEDIATION Q. 19, 30 (1995).

²⁰ *Id.*

²¹ See Salem & Milne, *supra* note 1, at 36 ("Most mediation proponents agree that many cases involving domestic abuse are inappropriate for mediation; that screening is necessary to determine which cases are appropriate; that mediators must be well trained in the dynamics of domestic abuse; that participation in the mediation must be safe, fair, and voluntary. . .").

²² See Fischer et al., *supra* note 9, at 2117 (describing the culture of battering as a continual pattern of dominance and abuse suffered by a battered woman).

²³ See Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39, 44 (1990) ("When I read pronouncements that mediation should never be attempted in cases involving domestic violence, it seems the authors are assuming all domestic violence-related situations fit one basic scenario involving a victimized, disempowered woman and her controlling, brutal, defensive male partner.").

²⁴ *Id.* at 44 (discussing the difference between an elderly couple arrested for throwing coffee at one another and a couple where the man has systematically beaten his wife for a number of years).

an appropriate and effective problem-solving technique with at least a percentage of those persons whose lives have been touched at some point by violence."²⁵

Another assumption by opponents of mediation in cases of domestic violence is that in order to mediate effectively, the parties must have relatively equal power²⁶—something that can never happen in a battering relationship. However, effective mediators are trained to balance the power between participants where there is a power imbalance.²⁷ In fact, literature in the field of international mediation asserts that mediation is the preferable format for dispute resolution "*especially* when there is a great difference in power between nations."²⁸ Also, it is important to remember that power issues are relative; while one party may have more power overall in a relationship, oftentimes each party has differing amounts of power in different contexts. For instance, one party may control the financial aspects of a marriage, while the other has more power relative to child rearing. Finally, power imbalances are not unique to families where domestic violence is a factor; many divorcing relationships can be characterized as exhibiting an unequal balance of power.²⁹ If mediation is only effective where there is relatively equal power between the parties, than certainly more than just families with violence would have to be excluded from the process.

It can also be argued that despite the drawbacks, mediation is more appropriate and effective than the adversarial process, even in cases of domestic violence. Experts have argued that "the overwhelming view by both social science professionals and judicial observers is that the adversarial system is simply inappropriate"³⁰ as an approach to divorce or custody. More

²⁵ *Id.*

²⁶ See Mary A. Duryee, *Guidelines for Family Court Services Intervention When There are Allegations of Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 79, 80 (1995) ("[M]any advocates of victims assert that the basis of mediation requires that the parties be of relatively equal power, and when the parties are not equally powerful, mediation is not possible.").

²⁷ See generally Maxwell, *supra* note 3. The argument is carefully stated that there must be a balance of power at the mediation table, not that the parties must begin the mediation with equally powerful positions. This notion seems intuitive when one considers how rarely parties to any dispute have an equal amount of power.

²⁸ See Duryee, *supra* note 26, at 80. For example, if two countries are disputing and one possesses significantly more arms than the other, mediating the dispute is in the best interests of both parties.

²⁹ See Chandler, *supra* note 3, at 334.

³⁰ See Knowlton & Muhlhauser, *supra* note 6, at 256 (citing ELLEANOR E. MACCOBY & ROBERT H. MNOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 13 (1992) (describing the results of an in-depth study of 1100 families involved in divorce and/or custody disputes)).

specifically, the nature of the adversarial process can actually exacerbate the relationship between abusive partners. As some commentators have observed, "[t]he adversarial approach escalates the conflict, encourages scapegoating and victim behaviors, and reinforces just those factors that contribute to abuse in the first place."³¹ It can also be argued that mediation is superior to the adversarial process when domestic violence is present, because mediators themselves are more likely than attorneys to identify abuse and be in a better position to deal with intimidation and violence.³²

In response to the argument that the mediation process protects batterers from legal sanctions and in turn fails to treat battering as a crime,³³ it can be argued that mediation actually encourages participants to seek outside help. As one commentator has asserted, "[m]ediation can be an effective forum for getting people to commit to treatment."³⁴ In the traditional adversarial process, litigants lack incentives to admit to past abuse (and, in fact, actually have incentives to litigate and deny the abuse) for fear that a fact-finder will take abuse into account in a decision.³⁵ Mediation, on the other hand, provides batterers and their spouses the opportunity to address the violence in a way that enables them to devise safety mechanisms.³⁶ The mediation process, unlike traditional litigation, encourages the participants to create guidelines governing future relations.³⁷ Finally, eliminating the systematic forces encouraging batterers to deny abuse can further the victim's healing process.

Another benefit to the mediation process is the sense of empowerment it can provide to the victims of domestic violence. It has been stated that "[t]o define a spouse as 'abused' encourages her to act from that framework. . . . [M]ediation, as a future-oriented process, seeks to focus

³¹ Corcoran & Melamed, *supra* note 18, at 311 (arguing that spouses might learn to relate to one another in nonthreatening ways if they have the supportive experience of the mediation approach).

³² See Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 FAM. & CONCILIATION CTS. REV. 30, 32-33 (1995) (explaining that mediation may be superior to the adversarial process even in cases of domestic violence for a variety of reasons).

³³ See Joyce, *supra* note 12, at 453.

³⁴ See Yellott, *supra* note 23, at 43.

³⁵ See Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 MEDIATION Q. 377, 385 (1990) (stating that the adversarial approach encourages abusers to deny past abusive behavior). See also Joyce, *supra* note 12, at 456 (stating that the future orientation of mediation "empowers couples to take responsibility for their past [behavior] and rise above it by setting boundaries for future behavior").

³⁶ See Salem & Milne, *supra* note 1, at 36.

³⁷ See Joyce, *supra* note 12, at 451.

people on where they are going in their lives as separate, whole, independent people."³⁸ As another commentator notes, "mediation empowers participants to end violence . . . by serving as a model of conflict resolution."³⁹ In one mediation pilot program, women who had been formerly abused were excluded by the legislature from participating.⁴⁰ Many of the victims expressed the belief that the prohibition against mediating was damaging, rather than helpful.⁴¹ The victims, in the name of self-empowerment, believed that they should have the ultimate power to decide whether or not mediation was in their best interest.⁴²

Finally, and perhaps most importantly, there is evidence to support the argument that mediation in cases of domestic violence can actually have an impact on lessening the incidents of abuse. "A study conducted in Ontario by Professor Desmond Ellis (Family Mediation Pilot Project Final Report, Ministry of the Attorney General, Toronto, Ontario, July 1994) found that mediation was associated with a greater reduction in physical, verbal, and emotional abuse than lawyer-assisted settlement."⁴³ The theory is that because the mediation process promotes cooperation, it can be utilized as a tool to help break the cycle of violence. As one group of researchers states, "[m]ediators work well with existing therapeutic and legal approaches"⁴⁴

In addition to these arguments for expanding and encouraging divorce and custody mediation despite the prevalence of domestic violence, there are numerous arguments that have not been explored in depth here. Other arguments include the fact that mediators, unlike judges, can customize the process; that mediation, unlike the adversarial system, provides a model of future interaction; that mediation can address issues the court typically would

³⁸ Corcoran & Melamed, *supra* note 18, at 313 (quoting John Haynes, Advanced Training Presented at the 6th Annual Conference of the Academy of Family Mediators (July 1989)). The authors continue by stating that "[m]ediation can be a route to empowerment and responsibility for both parties and can avoid perpetuating the victimization of the abused." *Id.* at 314.

³⁹ See Joyce, *supra* note 12, at 451 ("[M]ediation can provide a supportive, empowering environment for women who in many cases have been stripped of their identity, dignity, and self-esteem.").

⁴⁰ See Thoennes et al., *supra* note 3, at 8.

⁴¹ See *id.*

⁴² See *id.* at 8-9 (citing S. DIPIETRO, ALASKA CHILD VISITATION MEDIATION PILOT PROJECT, REPORT TO THE ALASKA LEGISLATURE 25 (1992)).

⁴³ Salem & Milne, *supra* note 1, at 36. See also Erickson & McKnight, *supra* note 35, at 378 ("We believe that mediation sessions with both spouses present can reduce the likelihood of future abuse.").

⁴⁴ See Erickson & McKnight, *supra* note 35, at 378.

not include; and the general advantages of mediation, such as being more efficient and less expensive than the adversarial process.

IV. IF WE ULTIMATELY DECIDE THAT MEDIATION IS MORE BENEFICIAL THAN NOT, HOW DO WE DEVISE A COURT-CONNECTED PROGRAM THAT SERVES AND PROTECTS?

It is the contention of this Article that the benefits of mediation strongly outweigh the potential harms for families overall, including those where violence is an issue. However, that is not to say that courts should not take steps to minimize potential negative effects, as well as address the valid concerns of mediation opponents. Including procedural safety nets at each step of a court-connected mediation program can serve to protect mediators, court personnel, and program participants. The remainder of this Article will be dedicated to outlining the various protections family court programs can put in place before, during, and after divorce and/or custody mediations.

A. Pre-Mediation Safeguards

It has already been recognized that not all families are appropriate candidates for court-connected mediation programs.⁴⁵ However, at least one researcher has found that screening can be effective in assuring that inappropriate cases are excluded from the mediation process.⁴⁶ Because many families, including those that have experienced violence, can be better served by the mediation process, one of the most important responsibilities for a court-connected program is to establish adequate screening mechanisms. Cases entering a domestic relations court mediation program will fit into one of the following three categories: appropriate for standard mediation; appropriate for mediation but necessitating some modification in form; or inappropriate for mediation.⁴⁷

Screening for domestic violence is a procedure that should be done throughout the mediation process; however, the vital time to exclude inappropriate cases from mediation is at the pre-mediation stage. To begin, it is important that screening be detailed enough to elicit the many types of violence that can be present in a marital relationship. For instance, simply

⁴⁵ See Salem and Milne, *supra* note 1, and accompanying text.

⁴⁶ See Chandler, *supra* note 3, at 344-45.

⁴⁷ See Thoennes et al., *supra* note 3, at 14 ("Once domestic violence has been identified as an issue, either through screening or during the session, the options are to excuse the case from mediation; proceed with mediation using approaches that are believed to afford special safeguards; or proceed with mediation as usual.").

asking, "Has your spouse ever struck you?," would not uncover the many forms of psychological abuse that may be present, such as threats of violence.⁴⁸ It is also somewhat intuitively obvious that the screening needs to be private, as many victims will not reveal abuse in the presence of their spouse.⁴⁹ Having the screening done by an individual other than the person assigned to mediate the case is also an important safeguard, so that any incidence of mediator bias can be avoided.⁵⁰ Screening should also involve at least some verbal component in addition to written questionnaires, as some parties may not be literate.⁵¹ This could involve either a face-to-face interview at the time of the mediation or a prior telephone interview.

Once the initial screening process has been completed, the real task at hand is to determine which cases should be excluded from the mediation process, which should undergo modified mediation, and which can proceed as usual.⁵² The screener must distinguish between a relationship where the parties still are able to mediate on relatively equal terms, and where there has been a "culture" of battering.⁵³ At a minimum, it would seem that mediation is inappropriate if the abuse is ongoing, there have been threats with or use of weapons, and/or the victim appears unable to place her needs ahead of the

⁴⁸ For a detailed list of sample questions to ask during the screening process, see *infra* p. 18 app. A.

⁴⁹ Salem & Milne, *supra* note 1, at 37 ("A screening process that asks directly and specifically about abuse in a private, face-to-face setting is generally the most effective A victim is highly unlikely to report abuse in the presence of the other spouse."). The authors also suggest that screening be done by someone of the same gender as the individual being screened, to increase the chances that the abuse will be disclosed. *Id.* Further, a study conducted by Thoennes et al., *supra* note 3, at 26, made the somewhat disturbing discovery that only about half of all responding mediation programs reported that screening was performed directly and privately prior to the mediation. It must be emphasized that this is the most effective method of identifying cases where domestic violence is an issue.

⁵⁰ See Menard & Salius, *supra* note 16, at 301 ("[M]ediation screening should be conducted by highly trained, independent screeners who have no monetary or programmatic interest in the outcome of the screening process."). See generally Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 43 (1995).

⁵¹ Gerencser, *supra* note 50, at 44.

⁵² See Thoennes et al., *supra* note 3, at 14. In a national study conducted of 149 court-connected mediation programs, eighty-five percent of respondents said that less than fifteen percent of cases referred to mediation were excluded due to domestic violence. *Id.* If the incidence of marital abuse is as high as some of the studies have found, it can be argued that not enough cases are being excluded.

⁵³ Gerencser, *supra* note 50, at 61 (stating that "[e]ven a trained mediator is likely to find this task difficult").

batterer's.⁵⁴ Other commentators have suggested that cases should be excluded from mediation where the couple has had "mediation sessions" on their own, that is, if they have gotten together and made agreements without the benefit of a mediator.

Another pre-mediation safeguard that should be put in place is an understanding regarding "mandatory" mediation. Many states and localities have legislation in place that makes mediation mandatory in the case of divorce, custody, or visitation disputes. However, good court-connected mediation programs should recognize the fact that not all cases are appropriate for mediation. Successfully concluding the screening process or appearing at the orientation program should fulfill the mandatory attendance requirement. Parties should be able to decline continuing participation after the process has been explained, if they feel they are unwilling or unable to mediate. In order to make this clear to all, parties should be asked specifically whether or not they wish to continue after the screening process has been concluded.⁵⁵

Further, a necessary factor in setting up the mediation program is to stress the importance of not tying the success of the program to the number of cases successfully mediated to a full or partial agreement.⁵⁶ While it may be somewhat difficult to divorce the evaluation of a mediation program from the number of cases successfully mediated, it is important that all court-connected programs at least make some assurances to their mediators that their performance will not be judged on either sheer volume of cases mediated or percentage of cases fully or partially settled. Programs should attempt to avoid situations where a mediator's "gut reactions" lead them to believe a particular case should be excluded from the mediation process, but they attempt to mediate anyway in order to keep the program's "numbers" up.

⁵⁴ See Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 *MEDIATION Q.* 365, 374-75 (1990). This article is very helpful in sorting the cases into the following three categories: those that should be excluded from the mediation process, those that should be modified, and those that can proceed as normal. See *id.* at 372.

⁵⁵ See generally Colleen N. Kotyk, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 *WM. & MARY BILL RTS. J.* 277 (1997) (suggesting that mandating mediation in the case of domestic violence may be a violation of participants' due process rights under the Fourteenth Amendment).

⁵⁶ Fuller & Lyons, *supra* note 17, at 923 ("[M]ediators and programs should not be evaluated on the basis of the number of agreements, as a high rate of agreement may indicate that many cases are being resolved in mediation because one participant is unable or unwilling to stand up for what he or she believes.").

A final pre-mediation safeguard to which all court-connected programs should pay special attention is the qualifications and training of their mediators. As one commentator has stated, "[m]ediation training must provide the information and the skills needed so that mediators can serve as competent and sensitive assessors of the presence of domestic violence with knowledge of the effects of domestic violence on the victim."⁵⁷ Specialized training is important, because studies have shown that training can and does heighten awareness of the difficulties surrounding family violence and produces tangible improvements in case handling.⁵⁸ The need to obtain continuing education regarding domestic violence is a factor that should not be discounted by courts.⁵⁹ It would be wise for all court-connected mediation programs to devise some sort of training requirements and minimum mediator qualifications, in order to ensure that they are providing their clientele with experienced service providers.

B. Safeguards Throughout the Mediation Process

Not only is it important for court-connected programs to establish protocols for the pre-mediation stage, but it is also important to have various safeguards in place during the actual mediation conference. When it has been established that there has been some past violence in the relationship, but not enough to exclude the couple from the mediation process, certain modifications should be available. For instance, mediators should be encouraged to utilize such methods as private caucuses, "shuttle" mediation, telephone mediation, and the use of special advocates.⁶⁰ Ideally, the screener would make this determination, assign an appropriate mediator, and communicate the process to be utilized.

Further, it has been stated that "[m]ediation, by definition, is adaptable to meet the individual needs of the negotiating parties. Mediation can include

⁵⁷ Maxwell, *supra* note 3, at 345. See also Fuller & Lyons, *supra* note 17, at 915 ("Training should provide mediators with a greater understanding of how to deal with the complexities of power and control in a domestic violence situation.").

⁵⁸ Thoennes et al., *supra* note 3, at 25.

⁵⁹ See Fuller & Lyons, *supra* note 17, at 926-27.

⁶⁰ See Salem & Milne, *supra* note 1, at 38. Caucuses are a process whereby the mediator talks with each party one-on-one, in order to solicit information which the party may not feel comfortable discussing in the joint session. Shuttle mediation is a special form of mediation whereby the parties are not in the same room, and the mediator "shuttles" back and forth. If it is not desirable to have the parties in the same building, telephone mediation could be utilized. Finally, if a party feels unsure of his or her ability to be a strong advocate for his or her case, an attorney, counselor, or victim advocate may accompany and support the party during the mediation. *Id.*

victim advocates or attorneys in order to balance negotiating power and eliminate intimidation and fears of inadequate representation. Caucusing procedures may be utilized to ensure safety or disclosure."⁶¹ Finally, one commentator even made the suggestion that male/female mediation teams may be an effective and creative solution to the sensitivities involved in cases of domestic violence.⁶²

It is also important that as a component of any court-connected mediation program, participants as well as the mediator are all made aware of the fact that anyone has the power to terminate the mediation at any step of the process. For instance, a mediation could be terminated if either party shows up under the influence of drugs or alcohol,⁶³ or if either party is unable to conform to the stated rules,⁶⁴ such as the request to refrain from name-calling. Participants and mediators must be assured that it is not considered a failure to terminate a mediation, and that "there are no legal repercussions for doing so."⁶⁵ It is essential that courts and individual mediators have a "termination plan" in place for when it becomes apparent during a mediation that continuing would not be in the best interest of one or both of the parties, or when one party has explicitly requested termination.⁶⁶ Because abuse issues may arise unexpectedly, it is important that mediators be trained and prepared to handle potentially volatile situations.

Additionally, it is also critical that courts have in place safety measures to protect all mediation participants during the process. Even parties who do not have a past history of violence could react unexpectedly under the stress of a family mediation. Careful attention should be paid by mediators to the physical layout of the building, internal alarm systems, and access to security personnel, should an emergency situation arise.⁶⁷ Court services should take care that the address and telephone number of participants and the mediator be safeguarded.⁶⁸ Protocols such as having separate entrances, different

⁶¹ Corcoran & Melamed, *supra* note 18, at 312.

⁶² See Yellott, *supra* note 23, at 47.

⁶³ See Erickson & McKnight, *supra* note 35, at 387.

⁶⁴ *Id.*

⁶⁵ Fuller & Lyons, *supra* note 17, at 925. It is important to the mediation process that all participants weigh the pros and cons of the mediation, and decide whether it is the best method. See *id.*

⁶⁶ See generally Barsky, *supra* note 19 (discussing the various ethical and practical issues that arise when a mediation must be terminated). See also Knowlton & Muhlhauser, *supra* note 6, at 265 (recommending that mediators be ready to assess any potential problems and refer them to the appropriate agency in order to diminish the likelihood of harm to any participant in the case of termination).

⁶⁷ See Duryee, *supra* note 26, at 85.

⁶⁸ *Id.*

arrival times, and escorts to cars and transportation systems should also be incorporated in any court-connected program.⁶⁹ In essence, it is the responsibility of court-connected mediation programs to provide for the safety of participants and mediators at all times during every mediation. Courts must assume that violence could be an issue in any family mediation, even when it has not yet occurred or was not identified in the screening process.

Finally, court-connected mediation programs should also be able to provide or at least make available to participants information about, and access to other community resources. If at all possible, courts should be able to provide advocates for those who may be in need of their services.⁷⁰ Mediators should have the power to design other supports, such as suggesting that victims of abuse participate in counseling or support groups, or by having batterers participate in anger management programs.⁷¹ This may be a more pro active mediator model than some programs currently advocate. However, in this context, mediators should be encouraged to initiate these suggestions. It has been wisely suggested that "[a]ll court-connected services should have information on resources within the community (e.g., shelters, anger-management programs, counselors) for clients."⁷² In this way, the court fulfills its duties by acting not only as conflict manager, but also as an agent of conflict reduction.

C. Post-Mediation Process Safeguards

It is extremely important to the mediation process that courts not only facilitate mediation agreements, but also assure their fairness on at least some level. It is understood that a basic tenet of mediation is that the parties are autonomous and should have the ability to devise their own agreement. However, when the mediation conference occurs under the auspices of the court, some attention must be paid to the inherent fairness and appropriateness of individual agreements to ensure consistency with basic public policy. Agreements that are so unjust as to offend basic sensibilities should be disallowed in the interest of court and mediation program legitimacy. It is the recommendation of this Article that mediation

⁶⁹ See Fuller & Lyons, *supra* note 17, at 926.

⁷⁰ See Salem & Milne, *supra* note 1, at 38 ("Having an advocate for each party present during mediation may facilitate a balanced discussion of the issues and address concerns about intimidation and uninformed decision making.").

⁷¹ Corcoran & Melamed, *supra* note 18, at 313.

⁷² Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 FAM. & CONCILIATION CTS. REV. 30, 59 (1995).

agreements be read into the record in the presence of a judge, so that there is at least some amount of judicial review available.⁷³

It is also important for courts to consider the feasibility of some sort of follow-up services when mediation has been successfully completed. It is in the interest of the court to be assured that mediation agreements are being upheld, and that the continuing safety of all parties to the mediation is accomplished. Also related to follow-up concerns, it is important that if possible, courts should not place time limits on the mediation process. The dissolution of a marriage can be a time consuming process, and within the limits of court resources, mediation participants should have as much time and attention as they need and deserve.⁷⁴ If at the end of the first mediation session the mediator and/or the parties think a follow-up would be helpful, the court should make all attempts to schedule this session.

Finally, the role of the lawyer in any court-connected mediation program is too essential to be overlooked. Lawyers have a role throughout the process, including the following: educating their clients about the mediation process; helping clients assess whether or not mediation is appropriate for them; assisting their clients in obtaining civil protection orders, if necessary; preparing their clients to be good advocates; attending the mediation, if it would be in the best interests of their client; and finally, reviewing any mediated agreement before the client signs it.⁷⁵ It must be stressed that "[t]he mediation process does not eliminate the need for independent legal counsel."⁷⁶ Any court-connected program should invite the active participation of the local bar in order to secure the initial and continuing success of the program.

V. CONCLUSION

There does not seem to be a clear case to reject mediation for family disputes, despite the prevalence of domestic violence. One of the key factors in the area of dispute resolution is to offer as many alternatives to parties as

⁷³ This author has witnessed parties to a custody and visitation mediation that attempted to reach an agreement on how often and with what instruments one party was allowed to utilize corporal punishment on the parties' child. The mediator, in the interest of party autonomy, allowed the parties to make this agreement. However, during the process of reading the agreement into the record, the magistrate involved informed the parties that this was not an appropriate subject for a mediated agreement; in the estimation of this author, this was a proper exercise of judicial review.

⁷⁴ See Duryee, *supra* note 26, at 85.

⁷⁵ See Gerencser, *supra* note 50, at 63-64.

⁷⁶ Salem & Milne, *supra* note 1, at 38 (stating that good mediators encourage parties to check in with attorneys before and after each mediation session).

possible, so that the most appropriate method can be chosen for each case. Considering the numerous benefits that mediation can offer over the adversary system, it would seem a senseless loss to exclude all court mediation programs as an option for individuals whose interpersonal relationships contain elements of domestic violence.

However, this is not to say that court-connected mediation programs can be unmindful of the special difficulties that the prevalence of domestic violence in our society presents. In fact, because court-connected programs are under the auspices of the court system, court-connected programs have an even higher duty to protect those members of society who need it the most. With proper planning, thorough training, and special safeguards, court-connected mediation programs can provide high quality, safe service to their constituents.

APPENDIX A⁷⁷

1. Do you have any concerns about mediation that you would like to share with me?
2. Is there anything that you feel you can't say in front of your spouse?
3. Do you think your partner has a hidden agenda?
4. Have there ever been any instances of abuse in your marriage?
5. Specifically: has your partner ever hit you? Pushed you? Smacked you? Kicked you? Bit you? Punched you? Hit you with any object other than a hand? Threatened you with or used any sort of weapon upon you?
6. Has your partner ever forced you to have any type of sexual relations against your will?
7. Has your partner ever verbally abused you?
8. Has your partner ever intimidated or threatened you?
9. Have the police ever been called out to your residence to settle a dispute?
10. Do either of you have a problem with alcohol or other drugs? If so, do you believe this is a contributing factor to the problems with your spouse?
11. If you have been verbally, physically, or sexually abused, approximately when was the last incident? How often does the abuse occur?
12. Do you feel that there is any risk of homicide between you and your partner?
13. Have you or your partner ever attempted to commit suicide?
14. How are decisions made in your family?
15. Who controls the finances in your family?
16. What sort of methods do you use for conflict resolution?

The answers to these questions must be evaluated by a trained screener, who will be able to weigh the answers given. For instance, many individuals going through a divorce believe that their spouse has a "hidden agenda" (see question 3). An affirmative answer to this question does not necessarily mean the mediation should not proceed. It is merely a yellow flag, a cautionary piece of information that should be considered in conjunction with other answers.

⁷⁷ The development of these questions came from a variety of different sources, including MAINE COURT MEDIATION SERVICE, *MEDIATION IN CASES OF DOMESTIC ABUSE* (1992); Chandler, *supra* note 3; Girdner, *supra* note 54; Newmark et al., *supra* note 72; Yellott, *supra* note 23.